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October Term, 1950

No. 926

EDGAR J. OSSER, SR., *Petitioner*,

v.

JAMES W. OSSER, JR., and ROBERT C. OSSER, Executors of the Will of CHARLES H. OSSER, Deceased, *Respondents*.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OCTOBER TERM, 1960

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EDGAR J. ORME, SR., *Petitioner*,

v.

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QUESTION PRESENTED

Whether the United States Court of Appeals for the District of Columbia Circuit properly dismissed the appeal of petitioner because he did not show "excusable neglect" as the cause of his failure (1) to file the record on appeal in time in the Court of Appeals, (2) to make timely application in the District Court to extend the time for filing the record on appeal and docketing the appeal, and (3) to file a bond for costs on appeal.

COUNTERSTATEMENT OF THE CASE

The case at bar commenced in the Trial Court when petitioner (sometimes referred to as "appellant") filed a caveat to the will of Charles H. Orme, deceased. It was a familiar common law will contest. At the trial, respondents, (sometimes referred to as "appellees") the executors of the will of the decedent, prevailed. On June 6, 1960, (See "Judgment Confirming Probate After Verdict", contained in the supplemental record under pink cover in this Court)* a judgment confirming the will of Charles H. Orme was entered in favor of respondents (R. 33, Item 21).

Petitioner noted an appeal on June 24, 1960, (See "Notice of Appeal" contained in supplemental record under pink cover in this Court) (R. 24a). On July 14, 1960, petitioner, in the Trial Court filed a motion for extension of time to designate the record on appeal (R. 2[illegible] but on the next day, July 15, 1960, filed his designation of record on appeal (R. 30), to which respondents filed a counter designation in the Trial Court on July 22, 1960 (R. 33). (See supplemental record on appeal, "Docket Entries", under pink cover in this court). Thereafter nothing was done in the Trial Court by Petitioner. No application was made for extension of time in which to file the record in the Court of Appeals, no cost bond was filed, no deposit for costs was made for the purpose of obtaining a stenographic transcript of the proceedings at the trial, although the forty (40) days from the date of the entry of the judgment expired on August 3, 1960. (See "Docket Entries", *supra*). Respondents, however, on August 5, 1960, filed a designation of preliminary record on appeal (R. 32), (See "Docket Entries", *supra*) and on August 8, 1960,

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* No transcript of record was printed below. Petitioner did not designate for this Court the preliminary record on appeal filed by respondents below. Respondents did. For some reason the pages bear no numbers.

filed in the United States Court of Appeals for the District of Columbia Circuit a "Motion to Docket and Dismiss" the appeal (R. 1). The appeal was dismissed (R. 12) and petitioner's efforts to change that ruling were denied three times (R. 40, 44, 45).

That petitioner was in default is clear and not denied by petitioner in his petition for the Writ of Certiorari heretofore filed herein. Petitioner claims that the United States Court of Appeals for the District of Columbia Circuit erred because it failed to find that the delay of petitioner was due to "excusable neglect."

Nothing could be clearer than that petitioner has utterly failed to show "excusable neglect." Neglect has been shown, but no excuse of any kind has been made by petitioner below, or in this court, for his failure to act within time in the Trial Court to make a deposit for the costs of the stenographic record, to file the cost bond on appeal, to obtain an extension of time in which to file the record on appeal in the United States Circuit Court of Appeals, or actually to file or docket the appeal in the Court of Appeals on time.

STATUTES AND RULES INVOLVED

In addition to the statutes and rules cited by petitioner, Rule 19 of this court is also brought into play.

ARGUMENT

Merely to state the question and the rule of this court deemed applicable (Rule 19) clearly indicates the impropriety of the application for the Writ of Certiorari heretofore filed herein.

The present application for certiorari boils down simply to a dissatisfaction on the part of petitioner with the ruling of the Court of Appeals, where he tried four (4) times (R. 12, 40, 44, 45) to have the Court of Appeals determine that his delay and neglect were excusable.

Nothing could be less important in terms of the public issues to be decided by this Court, than to take the time to explore whether the Court of Appeals below should have been persuaded that petitioner's delay and neglect were excusable.

No conflict exists in the decisions of any of the Circuit Courts of Appeal. The case at bar does not involve an important question of local law and certainly is not in conflict with applicable local laws. The case below has not involved the decision of an important question of federal law, nor did the case below decide a federal question in a way in conflict with the applicable decisions of this Court. Obviously, the decision below did not depart from the accepted and usual course of judicial proceedings.

Petitioner appears to have deliberately postponed necessary steps to be taken on appeal from a judgment of the District Court: (1) obtaining appropriate extension of time in the District Court, (2) filing cost bond, (3) making payment for the stenographic transcript of the testimony, (4) filing the record and docketing the appeal in the Court of Appeals within time, all because (a) he was in the State of Rhode Island for the summer, (b) he thought he might settle his case, thus making an appeal unnecessary. *It is not represented, and cannot be represented, that petitioner was ignorant of his deliberate omission or was misled by any real hope of settlement.* His omission must be inferred to have been the result of a deliberate choice to flaunt the requirements of the rules, in part, to save money. He does not, and cannot, represent that he is in financial need.

Petitioner was apparently not sure whether he wanted to go forward with his appeal until he sent his counsel his check for costs on August 15, 1960, (R. 10). Appellant did not have that much time to make up his mind under the rules. His time expired on August 3, 1960. F. R. Civ. P. 73(g). Appellant was on vacation in Newport,

Rhode Island, for the summer. (R. 21). He even refused to come to Washington on or about July 22, 1960, ". . . on the ground that it was expensive and difficult to make the journey . . ." (R. 21). This is sheer lack of desire by petitioner to go forward with his appeal as required by law and as instructed by his counsel.

Appellant may have thought he might settle his case, thus making an appeal unnecessary. Or appellant may have intended to abandon his appeal. Meanwhile, he concluded not to spend the money for deposit for the stenographic transcript or to incur the other expenses involved.

His foregoing conduct was in the face of a letter of his own counsel dated July 22, 1960, (R. 28) pursuant to the terms of which appellant was informed as follows:

> "I trust you are enjoying your vacation. Let me hear from you on this matter at once, as the opposition will not cooperate in any delay . . ."

On August 4, 1960, (R. 35), appellant was warned by his own counsel to forward fees so that counsel could "get on with the case;" again on August 9, 1960, petitioner's counsel warned him that counsel could not "go forward unless you forward me the money outlined in my last letter." (R. 35). Despite all the foregoing, appellant did not forward to his counsel the necessary deposit for his costs until the 15th day of August, 1960. (R. 10):

> "These funds were received in the form of checks on August 15, 1960."

For the first time in his petition for the Writ of Certiorari herein, appellant attempts to create an impression that he was ill. The record below discloses no reference to illness on the part of appellant in connection with his previous detailed and lengthy applications for leave to proceed in the Court of Appeals. "This point was not raised

prior to the petition for certiorari and, in the circumstances, we do not consider it." *Helvering* v. *Minnesota Tea Co.* 296 U. S. 378, 380 (1935).

Moreover, the affidavit of petitioner attached to his petition for certiorari, (Appendix 3a) is inconsistent with his prior statements in the Court of Appeals. For instance in his affidavit filed here, paragraph five, he states as follows:

> "He was physically unable to respond to this letter or take any action thereon until after August 7, 1960; . . ."

The affidavit filed in the Court of Appeals below, dated August 19, 1960, attached to petitioner's Amended Reply, filed in the court below, August 30, 1960, paragraph six, refers to correspondence and negotiations by petitioner as follows (R. 10):

> "6. A four-page letter detailing the settlement offer was forwarded to Newport, Rhode Island on July 22, 1960 and an exchange of telephone calls and correspondence ensued, with the ultimate rejection of the offer by appellant."

Further correspondence by petitioner (R. 21) is shown as follows:

> "On July 26, 1960 appellant wrote his counsel a letter criticizing . . ."

Moreover, the affidavit in support of petitioner's motion below, dated October 20, 1960, filed in the Court of Appeals October 21, 1960, page three, (R. 22) refers to correspondence by petitioner as follows:

> "On August 8, 1960, appellant wrote counsel ... ."

For the foregoing two reasons, the affidavit for the first time filed herein as an appendix to the petition for the grant of a Writ of Certiorari should be ignored by this

court as a basis for any action whatever in respect of petitioner's case.

A mere discussion of the foregoing however indicates the unimportance of petitioner's case from a public standpoint. The Court of Appeals below acted fully within its power .See, *Maghan* v. *Young*, 80 U.S. App. D. C. 395, 154 F. 2d 13 (1946); *Citizens Protective League* v. *Clark*, 85 U. S. App. D. C. 282, 178 F. 2d 703 (1949). Whether the Court of Appeals below was right or wrong is purely a local question of no federal or national or public importance, although the court below was clearly right. None of the authorities cited by petitioner in any sense require a finding that his delay and neglect were "excusable."

Accordingly, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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